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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES RYAN GILHULA,

Defendant and Appellant.

C036907

(Super. Ct. No. 99F7484)

Defendant James Ryan Gilhula was convicted of assault with a semiautomatic firearm and two other charges after an incident involving his former fiancée. The trial court sentenced him to nine years in prison, including the middle term of six years on the assault conviction. On appeal, defendant contends the court erred in instructing the jury on the elements of assault and abused its discretion in sentencing him to the middle term on the assault conviction. In a supplemental brief, defendant also contends there is insufficient evidence to support his assault conviction. We will affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Defendant, a retired police officer and former SWAT team member, and his victim, a deputy marshall, began a relationship in early 1999 and became engaged in the summer of that year. The victim broke off the engagement in late August 1999 because she felt defendant was smothering her. After the breakup, defendant contacted the victim repeatedly, although she told him to leave her alone. Eventually, the victim changed her telephone number and left town for nine days to get away from defendant. Two hours after she returned to town, defendant found her at a grocery store and tried to talk to her, but she rebuffed him. That evening, as she stepped out into her back yard, she encountered defendant, who was standing outside with a gun in his hand. The victim screamed and ran back inside the house, trying to shut the door behind her, but defendant forced his way in, telling her she was "going to get it now."

As soon as defendant got inside the house, the victim grabbed the gun with both hands to try to keep him from pointing it at her. An extended struggle ensued, during which both the victim and defendant told her children to get out and call 911. Defendant eventually managed to shut the front door and to break the victim's hold on the gun. He then dragged her back to the bedroom holding the gun to the back of her head. The victim kept trying to reach for the gun, and defendant placed her in a choke hold, then threw her on the bed. She heard defendant manipulate the gun probably more than five times, perhaps cocking and releasing the hammer. The victim tried to calm

defendant down by talking to him, and ultimately he said "I can't go through with this. I can't kill you." The victim repeatedly asked him for the gun, and he eventually handed it to her. She then left the house.

After his arrest, defendant gave a statement in which he admitted the incident, including threatening to kill the victim, but claimed he had kept his finger off the trigger because he did not want the gun to go off during the struggle and he cocked the gun only once to try to get her to leave it alone. Ultimately, defendant was charged with attempted murder, assault with a semiautomatic firearm, first degree burglary, false imprisonment by violence, and stalking. The information also alleged two gun enhancements.

As relevant here, the trial court instructed the jury as follows on the crime of assault with a semiautomatic weapon: "In order to prove this crime, each of the following elements must be proved: One, a person was assaulted, and two, the assault was committed with a semiautomatic firearm. [¶] In order to prove an assault, each of the following elements must be proved: One, a person willfully committed an act which by its nature would probably and directly result in the application of physical force on another person, and two, at the time the act was committed, the person intended to use physical force upon another person or to do an act which was substantially certain to result in the application of physical force upon another person, and three, at the time the act was committed,

the person had the present ability to apply physical force to the person of another."

In closing argument, the prosecution argued that the gun did not have to be fired for an assault to occur and that "[p]ointing a loaded firearm at somebody is sufficient for an assault with a firearm," The prosecution also argued that the jury could find defendant guilty of assault for holding the gun against the victim's head. Defense counsel argued that an assault is "an attempt to commit a battery" and that the jury had to decide whether defendant was trying to assault the victim or trying to keep the gun away from her to keep her from getting hurt.

During deliberations, the jury sent the court a note asking for the definition of "physical force": "Is the gun itself considered physical force?", "Or is physical force hands-on?" Over defendant's objection, the court decided to give the jury a special assault instruction prepared by the prosecution which the court had previously refused as unnecessary. That instruction provided: "In the crime of ASSAULT WITH A SEMI-AUTOMATIC FIREARM no injury is necessary nor is it necessary that the firearm be fired. [¶] Pointing a loaded firearm at a person may be sufficient to show an attempt to apply physical force on a person and also the present ability to apply such physical force on the person, if you find that the defendant had knowledge that the firearm was loaded." After receiving this supplemental instruction, the jury found defendant guilty on the assault charge. The jury also convicted defendant of

false imprisonment by violence and unauthorized entry of property and found true the gun enhancement allegations. Defendant was acquitted of the remaining charges.

The court sentenced defendant to a total term of nine years in prison, which included the middle term of six years on the assault charge.

DISCUSSION

Defendant first contends the trial court erred in instructing the jury on the elements of assault with a semiautomatic firearm. Defendant contends the assault instruction the court gave initially did not properly define the intent element of assault "because it permitted the jury to convict defendant of assault with a semi-automatic firearm without finding beyond a reasonable doubt that he had a present purpose to injure [the victim] by employing the weapon." Defendant also contends the special instruction the court gave the jury during deliberations "compounded the error . . . in that it focused exclusively on the act and there was an omission of the required mental state." We find no error in the court's instructions.

Defendant contends the initial assault instruction was erroneous because it did "not instruct the jury as to the relevance of appellant's intent to batter by means of the semi-automatic firearm, . . ." According to defendant, the initial assault instruction "permitted conviction based on negligence," like the instruction this court found wanting in *People v. Smith* (1997) 57 Cal.App.4th 1470 (*Smith*). We disagree.

In *Smith*, the jury was instructed that to commit the crime of assault with a deadly weapon (there, an automobile), the defendant must "intend[] to commit an act, the natural and probable consequence of which if successfully completed would be the application of physical force upon the person of another" (*Smith, supra*, 57 Cal.App.4th at p. 1474.) We held that in the context of that case, "the abbreviated instruction directed the jury to apply a negligence standard to the assault element of the offense," which we concluded was incorrect. (*Ibid.*)

Relying on the first element of the assault instruction given here ("willfully committed an act which by its nature would probably and directly result in the application of physical force on another person"), defendant contends the assault instruction in this case is erroneous for the same reason we held the assault instruction in *Smith* was erroneous. In making that argument, however, defendant ignores the second element of the assault instruction the court gave here, which specifically addressed the intent element of the crime and which was *not* given in *Smith*: "at the time the act was committed, the person intended to use physical force upon another person or to do an act which was substantially certain to result in the application of physical force upon another person." Because defendant fails to take this aspect of the instruction into account, his entire argument is based on a faulty premise. We find no error in the court's initial assault instruction.

Defendant contends the supplemental assault instruction the court gave during deliberations was also erroneous because it "misstated the law" by focusing exclusively on the act and omitting the required mental state. According to defendant, "pointing a loaded firearm is sufficient for assault with a deadly weapon only when the culprit intends to use it as a means to commit a battery" and "it was error to instruct the jury that as a matter of law pointing the weapon satisfied a disputed element of the offense."

Like the initial instruction, we find no error in the court's supplemental assault instruction. Contrary to defendant's suggestion, the trial court did not instruct the jury that pointing a loaded gun, by itself, necessarily suffices to prove the crime of assault with a firearm. Rather, the court instructed the jury that "[p]ointing a loaded firearm at a person *may* be sufficient to show an attempt to apply physical force on a person and also the present ability to apply such physical force on the person" (Italics added.) This is an accurate statement of the law, and defendant fails to demonstrate otherwise. It is true the supplemental instruction addresses only the act required for an assault and the present ability element of the crime and does not address the required mental state. However, that is so only because the jury's question, which provided the impetus for the supplemental instruction, did not relate to the intent element of the crime. The jury specifically asked the court about what constituted "physical force," and the trial court attempted to answer that

question by giving the supplemental instruction. The jury did not ask about the intent element of assault, and therefore the trial court had no occasion to address that element further in the supplemental instruction.

"In reviewing a claim of error in jury instructions in a criminal case, this court must first consider the jury instructions as a whole to determine whether error has been committed. [Citations.] We may not judge a single jury instruction in artificial isolation, but must view it in the context of the charge and the entire trial record." (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1330-1331.) Taken as a whole, the assault instructions given here, including the supplemental instruction given during deliberations, did not omit the required mental state and therefore were not erroneous.

In a supplemental brief, defendant contends there was insufficient evidence to support his conviction for assault with a semiautomatic firearm. We disagree.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence that is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at

trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Here, defendant fails to account for the proper standard of review in arguing the evidence was insufficient to support his assault conviction. Defendant contends there is "uncontroverted evidence that he kept his finger around the trigger guard to prevent the weapon from firing, that he never attempted to fire the weapon, that he never threatened to shoot [the victim] and that he did not use the weapon as a bludgeon," and therefore there is no possible basis for finding he assaulted the victim with the firearm. However, the evidence that defendant kept his finger on the trigger guard to keep the weapon from firing was defendant's own statement following his arrest, which the jury was under no compulsion to believe, as defendant had a strong motive to minimize the criminality of his actions. As for defendant's contention he never threatened to shoot the victim, that is contradicted by the victim's testimony that defendant told her she was "going to get it now" as he forced his way into her house, gun in hand, as well as by defendant's own admission that he said "maybe once or twice that 'I'm gonna kill you' or, or 'I should kill you.'"

"An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.) "[T]he intent necessary to commit an assault is the intent to commit a battery" (*People v. Cotton* (1980) 113 Cal.App.3d 294, 301.) In addition, "[t]o constitute an assault there must be . . . an act which is close to accomplishment and not mere preparation." (*People v. Corson* (1963) 221 Cal.App.2d 579, 581.) "'The intent may be inferred from the doing of the wrongful act.'" (*Id.* at p. 582, quoting *People v. Roshid* (1961) 191 Cal.App.2d 692, 694.)

Viewing the evidence in the light most favorable to the judgment, the jury reasonably could have found defendant assaulted the victim with a semiautomatic firearm when he forced his way into her house with gun in hand, threatened to kill her, struggled with her for control of the gun, and held it against the back of her head as he dragged her into the bedroom. The fact that defendant ultimately lost his nerve and decided not to shoot the victim did not preclude the jury from finding his actions prior to surrendering the gun satisfied the elements of the crime of assault with a semiautomatic firearm. Accordingly, the evidence is sufficient to support defendant's conviction.

Finally, defendant contends the trial court abused its discretion by imposing the middle term of six years on the assault conviction. Specifically, defendant contends the court "improperly considered an element of the offense as a factor in aggravation and did not properly consider all the facts bearing

on the current offense, his lack of any prior criminal history and his personal history when it imposed the sentence."

The People contend defendant waived his claims of sentencing error by failing to object in the trial court. We agree. Lack of a timely and meaningful objection in the trial court waives a claim of sentencing error. (*People v. Scott* (1994) 9 Cal.4th 331, 351.) The waiver doctrine applies "to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices," including "cases in which the court purportedly erred because it double-counted a particular sentencing factor, [or] misweighed the various factors" (*Id.* at p. 353.) By failing to object at the sentencing hearing, defendant waived the claims of error he now advances.

DISPOSITION

The judgment is affirmed.

CALLAHAN, J.

We concur:

DAVIS, Acting P.J.

RAYE, J.